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Citation: Duncan, N. J. (2009). Teaching ethics pervasively or in discrete modules?.
London: The City Law School of City University London.

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TEACHING ETHICS PERVASIVELY OR IN DISCRETE MODULES?

At a recent conference¹ at which we were presenting some of the findings of our research project into the teaching of legal ethics, Sara Chandler and I asked the participants to divide into four groups to brainstorm good practice ideas for the teaching of ethics. We asked them to choose whether to work in the context of a pervasive approach, or a discrete module. We found it hard to persuade any groups to adopt a 'discrete module' perspective, although one was compliant. The other three all preferred to spend their time on a pervasive approach. Moreover, one insisted that we had proposed a false dichotomy and presented a proposal which combined a discrete module with a pervasive approach elsewhere in the programme. As I hope to show, this approach is dominant in a lot of the academic writing on this topic and does appear to present the best approach to teaching ethics on a law degree. Indeed, it is what is often meant by 'ethics by the pervasive method'². Why, then is it so rare to find it in practice?

In separate sections I will set out some of the advantages of adopting a full-scale pervasive ethics curriculum and propose what the literature suggests is the ideal model. However, the pressures against adopting this full-scale model are real and ever-present, so I will also propose ways of achieving many of the advantages while avoiding some of those pressures. I will draw on the published literature, on the experience of law lecturers who have permitted me to look at their programmes and modules, and on the results of the survey carried out by Sara Chandler and myself.

Why the Full Pervasive Method may not be Available

The curriculum is over-crowded. We may not be able to persuade colleagues, Deans or our students that the level of attention we would apply to ethics is justified or even appropriate. We live in a world of competing pressures for limited time and if your Law School is presenting itself as providing a 'corporate' focus, or a 'human rights' focus it may be hard to wrest time away from subjects which belong to those perspectives in an obvious way. One approach may be to point out the centrality of ethical behaviour and understanding to all the fields which may be the focus of attention, but that is merely a good argument, not a winning hand.

Indeed as one of the respondents to our study put it: 'Acquiring political power in the law school, directly or through others, is the only ultimately effective method'.³ However, even if that political power is achieved, Rhode has a word of caution:

'Asking professors in any subject matter to fantasize about the ideal curricula is unlikely to produce the ideal. Personal preferences will inevitably skew priorities, and ethics faculty are unlikely to prove exceptions. As Samuel Johnson warned in *Rasselas*, "Be not too hasty to trust . . . the teachers of morality . . . they discourse like angels, but they live like men."⁴ On the assumption that the point was meant generically, I suppose we ethicists should strive to set a good example and acknowledge self-interest in curricular design. Accordingly, we may wish to correct for our most intellectually imperialistic tendencies and settle for a compromise: ethics by the continuing method.'⁵

So there may be practical, political or principled reasons why the full pervasive method initially advocated by Rhode may not be available and the 'continuing method' substituted.

Ethics by the Continuing Method

Rhode's own proposal for this has been the model for a number of initiatives. These differ in a variety of ways and are worthy of attention as they respond to the context and needs within different jurisdictions and the circumstances of different law schools. They tend to adopt the following basic structure:

1. A first year module which introduces students to ethical principles. This is commonly in the context of an introduction to the legal system, to legal practice or the legal profession. Others approach it through a more philosophical study taking a more theoretical perspective on ethical or moral principles.
2. An embedding of ethical issues within one or more taught module within each year or semester of the programme.
3. A final year module which explores ethical issues in more depth, making more active use of the understanding and experience students may be expected to have acquired at this stage of their study.

Some of the following take the form of proposals. Others relate to programmes which have been implemented. They provide a wealth of examples and further discussion of the underlying principles of introducing ethics into the curriculum.

One of the more thorough examples of developing a structured continuing approach is that to be found at Griffith University in Queensland.⁶ This adopts the concept of 'vertical subjects' which run through the full period of the law degree.⁷ The vertical subjects cover a range of theoretical, contextual and practical issues. They are:

- (a) legal theory and interdisciplinarity;
- (b) group work;
- (c) ethics (professional responsibility rules; ethical decision-making);
- (d) generic and legal skills (including interviewing & advising, negotiation, drafting, advocacy, time & workplace management, diplomacy);
- (e) internationalisations; and
- (f) indigenous issues.

These subjects each have a co-ordinator who works with the co-ordinators of the conventional subjects to ensure that the content of the vertical subject is effectively integrated across the curriculum. This requires a high degree of co-ordination, which may be hard to achieve in many law schools. The rationale for the approach may best be seen in the Report of the Curriculum Review (Griffith University 2005), Robertson (2005) and Johnstone (2008).

What follows is a variety of articles and books which will be helpful in considering ways of introducing legal ethics to your curriculum. They have a bias towards the UK and Australia, as my major concern has been with the undergraduate degree. The experience of the US JD and that of other jurisdictions is, however, full of ideas and insights. I have only scratched the surface here and I hope that you will add other resources.

Andrew Boon: 'History is Past Politics: A Critique of the Legal Skills Movement in England and Wales', (1998) 25 *J. Law and Society*, 151 (identifying gaps in the law curriculum and criticising the separation of academic and vocational teaching).

Andrew Boon: 'Ethics in legal education and training: four reports, three jurisdictions and a prospectus', (2002) 5 *Legal Ethics*, 34 (providing historical and current context for proposals about content, methods and curriculum (esp. pp 64-6)).

June Chapman: 'Why Teach Legal Ethics to Undergraduates?' (2002) 5 *Legal Ethics* 68 (considering the factors in law degrees that arguably damage ethical behaviour and exploring discrete, pervasive and clinical approaches).

Sharon Christensen and Sally Kift: 'Graduate Attributes and Legal Skills: Integration of Disintegration?' (2000) 11 *Legal Education Review* 207 (presenting an integration of skills and ethics into a degree programme).

W Brent Cotter: *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education* (Federation of Law Societies of Canada, 1992).

Richard Johnstone: 'Incorporating Legal Theory, Ethics, Skills and Justice in a Law School Curriculum', Paper presented at International conference on the Future of Legal Education, Feb 20-23, 2008, Georgia State University college of Law.

Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney Law Review* 537.

D R F O'Dair: 'Ethics by the Pervasive Method: the Case of Contract', (1997) 17 *Legal Studies*, 305, (rationale for teaching professional ethics on undergraduate courses in the UK and exemplifying how a pervasive approach can enhance conventional teaching of contract).

Alan Paterson: 'Legal Ethics: Its Nature and Place in the Curriculum', in R. Cranston (ed) *Legal Ethics and Professional Responsibility*, 1995, Oxford: Clarendon Press, 175.

Guy Powles: 'Taking the Plunge: Integrating Legal Ethics in Australia' (1999) 33 *Law Teacher* 315, (responding to the previous article from the perspective of a law school just embarking on a pervasive approach to teaching ethics).

Deborah L. Rhode: 'Ethics by the Pervasive Method', (1992) 42 *J. Legal Education* 31, (the seminal article providing a rationale for the teaching of professional ethics and the use of the pervasive (or continuing) method in the context of the US JD).

Deborah L. Rhode: 'Professional Responsibility: Ethics by the Pervasive Method' (Aspen, 2nd ed., 1998), (the course-book designed to support the approach).

Michael Robertson: 'Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective', (2005) 8, *Legal Ethics* 222, (applying the theories of John Biggs and introducing the integration of legal ethics into the curriculum through the use of a 'vertical subject' at Griffith University).

Gonzalo Villalta Puig: 'Legal Ethics in Australian Law Schools' (2008) 42, *Law Teacher* 29, (proposing the teaching of 'Ethics-as-Judgment' as opposed to 'Ethics-as-Law' and suggesting structures within which to undertake this).

Julian Webb: 'Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England and Wales' (1996) 30 *Law Teacher* 270, (arguing for a 'strong pervasive' approach within which to introduce clinical methods).

Julian Webb: 'Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice?' (1999) 33 *Law Teacher* 284, (proposing principles and structures for teaching legal ethics in a holistic and pervasive manner).

1 LILAC Conference, 3-4 January 2008, University of Warwick.

2 The term coined by Deborah Rhode in her seminal article (1992) 42 *J. Legal Education* 31.

3 Chandler, Duncan (2008) paper presented to LILAC conference (see n. 1).

4 Quoting Caws, quoting Johnson, in *On the Teaching of Ethics in a Pluralistic Society*, Hastings Center Report, Oct. 1978, at 32.

5 Rhode *op cit* at p, 54.

6 But see also the programme at Queensland University of Technology presented in Christensen and Kift (2000).

7 Explained in Robertson, (2005) at p. 237-8 and in the conference presentation by Johnstone (2008).